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The Immigration Bill's proposals for young migrants in care will lead to a constitutional mess in Scottish policy-making

Gareth Mulvey, Graham Connelly & Sylvie Da Lomba

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According to Tomas Hammar immigration policy concerns who gets into a country and immigrant policy is about what happens once they get there. In Scotland most immigrant policy in the form of social policy is devolved. This means that the Scottish Parliament has control over health, education, housing and many other policy areas. At least until now. The present Immigration Bill threatens the devolved settlement through its proposals to limit discretion in social policy, in this case for young asylum seekers. The focus of this post is about what it means for young migrants in Scotland and more broadly what it suggests about the ability of Westminster legislation to have primacy over Scottish policy and practice.

In terms of the former, there are grounds for concern about the impact of the proposed legislation on support for young people living in Scotland whose immigration status is uncertain. Under numerous provisions at both UK and Scottish levels migrant children in theory have the same rights of access to universal services as all other children (see for example the United Nations Convention on the Rights of the Child ratified at the UK level and Getting It Right for Every Child (GIRFEC) the policy underpinning young people's rights and wellbeing in Scotland).

The Bill includes provisions which would remove local authorities' existing discretionary powers to provide support to young people who have been 'looked after' by councils but who have not yet been given leave to remain in the UK beyond the age of 18. A UK Government amendment introduced in December 2015 seeks to prevent local authorities, including Scottish authorities – and, it has to be assumed, the Student Awards Agency for Scotland – from providing support towards paying international fees for the higher education of those young people who have secured a college or university place but who do not qualify for home fees because of their uncertain immigration status.

As it stands the Immigration Bill would interfere with the basic rights of migrant children to continue their education in a college or university course by blocking their access to funding and to receiving the same 'after care' services from local authorities as other young people who have been in state care. It therefore has serious consequences for the rights of young migrants living in Scotland.

These are issues that should concern people in Scotland, whether from a child welfare perspective or from one concerned with the relationship between UK and Scottish law. Indeed if proof were required of the lack of care given to devolved matters by the UK Government it is evident in this Bill. The position of Scotland and Scottish law was evidently not considered, with statutory instruments being used as a way of imposing UK policy on devolved Scottish policy, although these are likely to be subject to challenge in the Scottish courts.

The Bill also appears to give precedence to UK immigration law and policy over devolved social policy matters, including child welfare legislation. The way in which the Bill has been constructed suggests that devolved issues either have not been adequately considered, or they have been considered but dismissed in view of the UK Government's desire to restrict the rights of migrants. The first scenario suggests that inter-governmental relations are not working, indicating that the devolved settlement is being given low importance by Westminster, a matter of serious concern for the future operation of devolution. However, it seems to us that this is more of a case of conspiracy rather than cock-up, suggesting an attempt by the UK Government to reinforce its legislative primacy, such that Scotland's devolved competencies can be stripped away by legislation emanating from the UK Parliament.

[Dr Gareth Mulvey](#) is a research fellow in the School of Social and Political Sciences at the University of Glasgow. **[Dr Graham Connelly](#)** is with CELCIS (the Centre for Excellence for Looked After Children in Scotland) at the School of Social Work and Social Policy, and **[Dr Sylvie Da Lomba](#)** is with the Law School, both at the University of Strathclyde.